BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAWN M. MOSHER	)	
Claimant	)	
VS.	)	
	)	Docket No. 223,357
UNITED PARCEL SERVICE	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the Post Award Medical Order of Administrative Law Judge John D. Clark dated March 29, 2005. Claimant alleges entitlement to ongoing osteopathic manipulation with osteopathic physician Ron J. Marek, D.O., for injuries suffered on March 28, 1997. The Administrative Law Judge determined that claimant's request for additional medical treatment should be denied, finding, while the manipulative treatments and hot packs make claimant feel better, he does not believe that additional osteopathic manipulation after over seven years of treatment is reasonable. This matter was placed on the Board's summary calendar and deemed presented on April 26, 2005.[1]

APPEARANCES

Claimant appeared by her attorney, Keith L. Mark of Mission, Kansas. Respondent and its insurance carrier appeared by their attorney, Robert J. Wonnell of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Board has considered the transcript of the Post Award Hearing of December 7, 2004, before the Honorable John D. Clark, Administrative Law Judge, with attachments; the transcript of the February 24, 2005 deposition of neurological surgeon Paul S. Stein, M.D., with attachments; the transcript of the evidentiary deposition of orthopedic

[1] K.S.A. 2004 Supp. 44-551(b)(1).

surgeon Robert L. Eyster, M.D., taken February 24, 2005, with attachments; and the transcript of the evidentiary deposition of Ron J. Marek, D.O., taken on January 26, 2005, with attachments; as well as the documents and pleadings filed with the Division of Workers Compensation; the transcript of the regular hearing held October 7, 1998, with attachments; the transcript of the evidentiary deposition of Sherrie Henderson taken October 7, 1998; the transcript of the evidentiary deposition of Angie Lassley taken October 7, 1998, with attachments; and the transcript of the evidentiary deposition of P. Brent Koprivica, M.D., taken October 23, 1998, with attachments.

The Board has further considered the stipulations contained in the transcripts of the regular hearing and the post award hearing, both above listed.

ISSUES

1. Is claimant entitled to post-award medical care with continued treatment to be provided by Ron J. Marek, D.O.?

2. Did the Administrative Law Judge err in the amount of expenses awarded?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds the Post Award Medical Order of the Administrative Law Judge (ALJ) should be affirmed.

Claimant suffered accidental injury on March 28, 1997, while working for respondent as a UPS delivery driver. Claimant's job required substantial lifting, with weights in excess of 75 pounds being lifted on a regular basis.

Claimant and respondent entered into a running award based upon a 6.5 percent permanent partial disability to the body as a whole on April 19, 1999, with ongoing medical care being provided by Ron J. Marek, D.O. Dr. Marek had initially begun providing claimant with osteopathic manipulation shortly after claimant's 1997 accident. Dr. Marek continued treating claimant until May of 2001, when he left the Riverside Hospital, going into private practice. Claimant returned to Dr. Marek, although the actual date of return is unclear from this record.[2] Certain places in the record indicate claimant may have returned to the doctor in October of 2001, after Dr. Marek provided a letter to Janet Keating at

[2] On page 13 of Dr. Marek's deposition transcript, it says claimant returned on January 3, 2002. See also pages 14-15.

Liberty Mutual Insurance Company.[3] There is testimony from the doctor that claimant did not return until December of 2002.[4]

Claimant continued treating, after returning to Dr. Marek, until October 25, 2004, although there is an additional medical report of December 27, 2004, indicating that claimant returned to Dr. Marek for additional treatment, but paid for that treatment herself. The authorized treatment was terminated in October 2004 as respondent's insurance company advised they would no longer pay for the treatment.

Respondent argues that the medical care provided by Dr. Marek is no more than feel-good treatment involving back rubs and heat packs. A review of the weekly reports from Dr. Marek attached to his deposition do read very similarly and, at times, almost identical to the previous weeks. It appears, even though claimant's injury was in her lumbar spine, Dr. Marek was treating the cervical, thoracic and lumbar spine for somatic dysfunction and muscle spasm, with hot packs and OMT (osteopathic manipulative therapy), originally several times per week, with the treatment later reduced to once a week. In most of the reports, it indicates that claimant received good results and relief of symptoms, but then apparently anticipates claimant returning because additional appointments are scheduled on a weekly basis.

Claimant was examined by board certified orthopedic surgeon Robert L. Eyster, M.D., in 1997, at which time claimant was diagnosed with degenerative disc disease at L1-L2. When claimant saw Dr. Eyster in 1997, she specifically requested chiropractic treatment for her low back because it made her feel better. Dr. Eyster had testified, however, that chiropractic manipulation for a low back condition, such as a degenerative change at L1-L2, was not appropriate treatment. It was simply, as he described, feel-good treatment. Dr. Eyster also provided certain restrictions and recommended self care, exercise and good back techniques. Dr. Eyster issued a letter on December 22, 2004, detailing the treatment recommendations without having the opportunity to re-examine claimant. However, Dr. Eyster did have the opportunity to re-examine claimant on January 19, 2005, at which time he noted claimant was not doing any of the exercises that had been originally recommended in 1997. X-rays indicated narrowing at L1-L2, without muscle spasm. Dr. Eyster found no objective need for ongoing treatment for claimant. Numerous questions were presented to Dr. Eyster regarding the ongoing manipulative treatment of Dr. Marek. Dr. Eyster acknowledged that while manipulative treatment serves a purpose early on in an injury, the same type of treatment

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[3] On page 14-15, it states that after this October 2001 letter was sent, Dr. Marek began treating claimant in January 2002.

[4] Marek Depo. at 13. Also, on page 13, and 14-15, it says that claimant returned to the doctor in January 2002.

provided over a several-year period would not be deemed as reasonable treatment resulting in any type of cure. He found the treatment being provided by Dr. Marek to provide temporary relief only and noted that claimant could obtain the same type of benefit on her own at home with appropriate exercise. It is noted that at the time of the post award hearing, claimant had bought a heat pack from the store to use on her low back which she testified provided some help. She had also bought an inversion table for use at home, which she testified helped realign her spine.

Claimant was referred to board certified neurological surgeon Paul S. Stein, M.D., for an examination on February 23, 2004. At that time, Dr. Stein found claimant's range of motion to be good, with no muscle spasms noted during the examination. He was unable to explain claimant's pain complaints up the entire spine. He also testified that neurologically, claimant was not in need of treatment, being less than complimentary to the osteopathic treatment that was being provided by Dr. Marek. It was fairly clear that Dr. Stein's opinion of osteopathic medicine was not positive. He testified that Dr. Marek's recommendations for treatment would not result in any type of cure.

Dr. Marek, on the other hand, justified his ongoing treatment of claimant over a several-year period, while providing heat treatment and OMT, as being a relief provider. He testified that claimant's recovery was slow, that she had not suffered a new injury, but that he was continuing to treat her for the 1997 accident. He also stated the treatment was relieving claimant's symptoms, which he diagnosed as somatic dysfunction.

Dr. Marek described somatic as being related to muscles and bones and dysfunction as being a painful functioning. Dr. Stein, on the other hand, stated that somatic had to do with the body, with dysfunction meaning a portion of the body was not working right, which he combined to mean claimant's body was not working right. That was his explanation for the somatic dysfunction definition provided by Dr. Marek. The long standing controversy between osteopathic and medical doctors was made evident during the litigation of this case.

Dr. Marek did acknowledge that, when dealing with soft tissue injuries, generally treatment would last from two weeks to two months, with six months not being uncommon. He acknowledged that any treatment beyond a year was uncommon, but not unheard of. He also testified that, in his opinion, claimant was not stable, as she felt good after the treatment, but then would worsen after leaving the treatment.

A treatment note of August 23, 2004, from Dr. Marek indicated that claimant's back has been bothering her a lot more, as she has been under a lot of stress with her work. He noted the stress and heavier work always seem to exacerbate her back symptoms. Dr. Marek's explanation of that particular note was that claimant had a history of stress at work, with the heavier work exacerbating her symptoms. The indication was that the note was discussing claimant's past history of work and symptomatology. However, the

Board's reading of the note suggests the problems discussed in the August 23 note are more current than Dr. Marek was willing to acknowledge. Claimant's employment with respondent terminated in early 2003.

The ALJ determined that the treatment being provided by Dr. Marek was nothing more than feel-good treatment, with no possibility of a permanent cure. In adopting the opinions of both Dr. Stein and Dr. Eyster, the ALJ determined claimant's ongoing need for the type of treatment being proposed by Dr. Marek was not related to her original injury of March 28, 1997. Therefore, claimant's request for additional medical treatment was denied. The Board, in reviewing this record, concurs with the findings of the ALJ. It is difficulty to ascertain how spinal manipulation and heat packs over a seven-year period could be anymore beneficial than, as noted by Dr. Eyster, feel-good treatment. And as the ALJ noted "everybody likes to have their back rubbed."[5] The Board, therefore, affirms the denial of additional medical treatment.

The ALJ also reduced the post-award expenses from $900 to $300 for Dr. Marek's deposition. The Board has held in the past that charging the costs associated with obtaining the testimony of a claimant's expert medical witness to the losing party is not appropriate under the Workers Compensation Act.[6] Even under the Code of Civil Procedure, fees charged by treating physicians for appearance and testimony at trial are generally not assessed against the losing party as costs.[7] The Board, therefore, reverses the finding by the ALJ that $300 in expenses for Dr. Marek's deposition should be assessed to respondent.

The ALJ determined that the attorney fee request by claimant's attorney should be reduced from $9,645.50 to $1,500.00. Claimant's attorney acknowledged that while he did not agree with that reduction in attorney fees, he chose not to make an issue of it and, instead, directed the Board's attention to the issues most affecting claimant. The Board, therefore, will not address the reduction in attorney fees.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Post Award Medical Order of Administrative Law Judge John D. Clark dated March 29,

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[5] Post Award Medical Order at 4, paragraph 13.

[6] *Deming v. National Coop Refinery*, No. 201,932, 2003 WL 22704135 (Kan. WCAB Oct. 31, 2003).

[7] *Grant v. Chappell*, 22 Kan. App. 2d 398, 916 P.2d 723 (1996).

2005, is reversed with regard to the post-award deposition expenses for Dr. Marek's deposition, but is otherwise affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Keith L. Mark, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director